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**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
OAKLAND DIVISION**

Case No. 4:20-cv-05640-YGR-TSH

EPIC GAMES, INC.,  
  
Plaintiff, Counter-defendant,  
  
v.  
  
APPLE INC.,  
  
Defendant, Counterclaimant.

**EPIC GAMES, INC.'S  
OBJECTIONS TO APPLE INC.'S  
PROPOSED FINDINGS OF FACT  
AND CONCLUSIONS OF LAW**

The Honorable Yvonne Gonzalez Rogers

Trial: May 3, 2021

Pursuant to Pretrial Order No. 3 ¶ 7 (ECF No. 389), Epic Games, Inc. (“Epic”) hereby lodges the following objections to Apple Inc.’s Proposed Findings of Fact and Conclusions of Law (ECF No. 779-1), filed on May 28, 2021. Epic disclosed its objections to Apple Inc. (“Apple”) on June 1, 2021, and the Parties have resolved certain of these objections, as set forth in Apple’s errata submitted to the Court on June 8, 2021. The Parties have been unable to reach agreement as to the resolution of the objections set forth herein, which, without conceding the accuracy of any other changes made by Apple: (i) relate solely to changes made by Apple in its May 28, 2021 filing (as compared to Apple’s last-submitted May 21, 2021 Proposed Findings of Fact and Conclusions of Law); and (ii) meet the standard for objections as set forth by the Court at the April 21, 2021 Pretrial Hearing (Hearing Tr. 51:4-52:16).

Findings of Fact ¶ 168.1. Apple claims that, regarding developer complaints about the App Store, “Epic focused exclusively on figures related to one narrow issue—search and discoverability—which . . . almost always leaves some developers dissatisfied”. (No. 779-1 ¶ 168.1.) That is incorrect. In addition to search and discoverability, Epic focused on survey data showing that “developers don’t believe that the App Store enables profitability of their apps” (Fischer Trial Tr. 879:23-880:1; PX-2284.6) and that developers believe that Apple “play[s] favorites” and doesn’t “apply[] the same rules to all apps” (Fischer Trial Tr. 887:4-7, 887:11-15; PX-2062.2). Epic also highlighted developer complaints regarding App Review delays (Kosmyinka Trial Tr. 1002:11-14), low ratings for the App Store’s provision of tools developers “need to successfully market apps” (DX-3800.073-.074; ECF No. 777-3 ¶ 324) and Apple’s deficiencies with respect to refunds, among others (Ex. Depo. 12 at 128:8-25 (Gray); Simon Trial Tr. 372:9-373:3; PX-2062.1, .7.)

Findings of Fact ¶ 602. Apple claims that “The challenged licensing terms do not restrain any competition that would occur in the absence of the DPLA.” (ECF No. 779-1 ¶ 602.) Epic objects to this paragraph because it purportedly relies on Mr. Malackowski’s written direct testimony, but this assertion appears to have been repurposed verbatim from Dr. Rubinfeld’s written direct testimony, which Apple withdrew. (*Compare* ECF No. 405 ¶ 602, *with* ECF No. 779-1 ¶ 602.) The cited paragraphs of Mr. Malackowski’s written direct

1 testimony do not discuss, much less support, any proposition concerning competition in the  
 2 absence of the DPLA. (*See* Ex. Expert 12 (Malackowski) ¶¶ 51, 54.) Nowhere in Mr.  
 3 Malackowski’s testimony does he address any economic principles regarding competition  
 4 associated with the DPLA. Indeed, he was proffered as an expert on intellectual property  
 5 valuation and licensing, not economics. (*See* Malackowski Trial Tr. at 3603:24-3604:3;  
 6 Ex. Expert 12 (Malackowski) ¶ 1.)

7 Findings of Fact ¶ 618. This paragraph relies on expert testimony that the Court has  
 8 stricken. Specifically, in reliance on paragraph 84 of Dr. Rubin’s written direct testimony,  
 9 Apple claims that “[m]any third-party app stores simply lack the . . . incentives to conduct the  
 10 same level of review and analysis as Apple” and that “[o]thers do not have the same standards  
 11 for privacy and may have economic incentives to affirmatively lower the level of review.”  
 12 (ECF No. 779-1 ¶ 618.) Epic objects because the Court struck the portion of paragraph 84 that  
 13 discusses “the incentives of third-party stores” and how they purportedly “drive [third-party  
 14 stores] to deliberately adopt a standard lower than Apple’s [App Review].” (*See* Trial Tr.  
 15 3511:1-12.)

16 Conclusions of Law ¶ 600. Apple claims that “Epic does not challenge the anti-steering  
 17 provisions in its UCL cause of action”. (ECF No. 779-1 ¶ 600.) This is incorrect. First, Epic  
 18 challenged these provisions under the California Unfair Competition Law in Count 10 of the  
 19 Complaint. (*See* ECF No. 1 ¶¶ 285-291.) Paragraph 285 of the Complaint references  
 20 preceding portions of the Complaint, which includes Paragraph 130. This paragraph describes  
 21 Apple’s policy that “[a]pps and their metadata may not include buttons, external links, or other  
 22 calls to action that direct customers to purchasing mechanisms other than in-app purchase”. (*Id.*  
 23 ¶ 130.) Second, in its Findings of Fact and Conclusions of Law, Epic challenges Apple’s  
 24 conduct in the iOS In-App Payment Solutions Market under the UCL. (*See, e.g.,* Epic’s  
 25 Conclusions of Law, ECF No. 777-3 ¶¶ 449, 454; *see also id.* ¶ 93, Epic’s Findings of Fact,  
 26 ECF No. 777-3 ¶¶ 368, 419 (discussing anti-steering provisions).)

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9 Respectfully submitted,

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